IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3530 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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JATINBHAI NYALCHAND SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3530 of 2002

MR HR PRAJAPATI for Petitioner No. 1

MR AY KOGJE Ld. AGP for Respondent No. 1-3

MS PJ DAVAWALA for Respondent No. 4

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 04/07/2002

ORAL JUDGEMENT

By invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner has prayed to issuance of appropriate writ or direction and also to quash and set aside the order of detention

dated 24.1.2002 passed by the District Magistrate, Vadodara under the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (Hereinafter referred to as "the PBM Act").

It is contended that the order under challenge is illegal and invalid on account of subsequent event even after the passing of the order, the continued detention of the petitioner has become bad in law.

Heard learned counsel for the petitioner Mr HR Prajapati, Ms. PJ Davawala learned Addl. Central Govt.Standing Counsel and Mr. AY Kogje learned AGP for other respondents.

The order of detention has been challenged on various grounds mentioned in the memo of petition and the learned counsel has taken me through the entire memo.However, he has focussed his arguments mainly on two grounds reflected in sub-para (o) & (p) of Para-4 of the petition. The order of detention has been passed on the grounds mentioned in annexure-B served to the detenu dated 24.1.2002. I have considered the grounds for detention and the relevant papers produced by the petitioner which were supplied to the petitioner when the order of detention was executed and also the copy of the order rejecting the application for anticipatory bail preferred by the detenu in the Court of Sessions, Vadodara. Affidavit-in-reply filed by the Deputy Secretary to the Govt. of Gujarat, Food, Civil Supplies and Consumer Affairs Department, Sachivalaya, Gandhinagar and the facts reveal in the counter affidavit filed by the Union of India are also considered.

Mr Prajapati has submitted that though the order of detention was passed on 24.1.2002, it was not executed and served to the detenu for 50 days for the reasons best known to the detaining authority. Because of the criminal cases registered by the police, after rejection of the application for anticipatory bail, the petitioner has surrendered to the police authority very well in time i.e. 28.1.2002 and he was thereafter sent in judicial custody for the crime registered vide CR No. 185 of 2001 at Sayajiganj Police Station, Vadodara. It is specifically contended that with an oblique motive the detaining authority or executing authority has not executed the detention order upon the petitioner and, therefore, the petitioner was compelled to file an application on 14.2.2002. Ultimately, the petitioner had to move this court by filing writ petition for appropriate direction or order with a view to see that

the order of detention is executed by the concerned authority at the earliest. The petitioner was very well available in the judicial custody even then the detention order was not served and after long exercise ultimately on 18.3.2002 the order of detention was executed i.e. after 50 days from 28.1.2002. It is argued that this delay in executing the order of detention would vitiates the subjective satisfaction recorded by the detaining authority. Mr Prajapti has placed reliance, in support of his submission on the ratio of the decision in the case of A. Mohmmed Farook vs. Jt. Sec. to G.O.I. & Ors., reported in 2000(2) SCC 360. The petitioner has referred, in the memo of petition the relevant para-10 of the cited decision. I would be appropriate to quote the relevant para-10 recorded in ground(o) of the petition:

"10. As indicated earlier the only explanation given by the detaining authority as regards the delay of 40 days in executing the detention order is that despite their efforts the petitioner could not be located at his residence or in his office and therefore, the order could not be executed immediately. No report from the executing agency was filed before us to indicate as to what steps were taken by the executing agency to serve the detention order. In the absence of any satisfactory explanation explaining the delay of 40 days, we are of the opinion that the detention order must stand vitiated by reason of non-execution thereof within a reasonable time. From Annexure P-2 (the proceeding sheet of the Metropolitan Magistrates's Court, Madras) it appears that the petitioner (accused) was present in the Court of Additional Chief Metropolitan Magistrate on 25.2.1999 as well as on 25.3.1999. Despite such opportunities neither the detaining authority nor the executing agency as well as the sponsoring authority were diligent to serve the detention order on the petitioner at the earliest. In this view of the matter, we are of the opinion that the subjective satisfaction of the detaining authority in issuing the detention order dated 25.2.1999 is vitiated. It is in these circumstances not possible for us to sustain the detention order."

, in the present case also the petitioner was in police custody on 28.1.2002 and, thereafter in judicial custody where the detention order would have been served. So, it is rightly argued that the subjective satisfaction

of the detaining authority to detain the petitioner forthwith gets vitiates and consequently the order of detention becomes bad in law. So, on this sole ground, the order of detention can be quashed.

The other grounds which has been pressed into service by the learned counsel for the petitioner is that because of the non-execution order of detention in couple of hours after the arrest of the petitioner by police in criminal case registered against him has seriously prejudiced the right to make an effective representation to the detaining authority. It is specifically contended by the petitioner that its constitutional right to make a representation to the detaining authority and effective representation is made within the period of 12 days, than he should get the order revoked by the authority who has recorded subjective satisfaction and passed the order of detention i.e. before approval of the order passed by the State Government. As the order was executed after 50 days under the oblique motive and for the reasons best known to the executing machinery, the right to make representation has been adversely affected and, therefore, on that count also, the continued detention of the petitioner becomes bad in law. In support of his submission, learned counsel Mr. Prajapati has placed reliance on the decision of this court reported in 2000(3) GLR p. 269 in case of Navinchandra Bhagvandas Gandhi vs. State of Gujarati & Ors., In this cited decision, the detenu was ordered to be detained under the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as the "PBM Act"). The detaining authority is empowered to consider the representation before the approval given to the detention order by the State Government. The detenu was in custody in connection with the criminal case registered against him when the detention order was passed. The order of detention was approved in the cited case on 9.5.2002 but the detention order was served upon the detenu on 8.5.202 i.e. a day prior to the execution of the order of detention. The Court held that the right to make representation to the detaining authority has denied and this denial goes to the root of the validity of the continued detention.

In view of the above two important vital issues, the order of detention can be quashed and shall have to be quashed. Even on one of these two grounds, the order of detention/continued detention can be held to be violative of constitutional safe guards, in other words, the guarantee enshrined in Article 22(5) of the Constitution of India. So, without dealing with other

grounds on merits, the court is inclined to allow this petition. Unless there is any type of power hangover, no agency would wait till 50 days for executing an order passed by itself or the sponsoring mechanism. Such delay is inordinate and fatal to the validity. In some cases, if oblique motive in the mind of authority is pleaded, it is not required to show satisfactorily that what that oblique motive is. This is one of such cases.

Before parting with the order, it would be important to note that on these two major points the Union of India obviously has nothing to say because both these grounds concern with the machinery of the State of Gujarat. Affidavit filed by the Deputy Secretary referred to hereinabove is totally silent on the above referred grounds (o) and (p).Of course, the detaining authority could have filed affidavit explaining the fact situation averred by the petitioner in the above said two grounds,however, there is no affidavit of the detaining authority available on record. When this matter listed for final hearing on 26.6.2002. Accepting the request of ld. AGP Mr. AY Kogje, the matter was adjourned so that the detaining authority can file the affidavit if the authority so desires. Even today, the affidavit has not been filed. The Court has considered the rival contentions and the oral arguments advanced by the ld. counsel appearing for the petitioner in the back-ground of the above referred two decision.

In the result, this petition is allowed. The impugned order of detention dated 24.1.2002 passed by the District Magistrate, Vadodara is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith, if he is not required to be detained in any other case. Rule made absolute. DS Permitted.

(C.K. BUCH, J.)
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